Supreme Court, U.S.
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No. _____

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

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FREDERICK J. KING - PETITIONER

vs.

STEPHEN GOLDSMITH,
GERALD YOUNG,
JOHN PATTERSON, - RESPONDENTS

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ON PETITION FROM

THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

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# PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. A question dividing the Federal Circuit Courts is what nefarious acts may one or more persons be permitted to perform with impunity in the course of obstruction of the truth seeking process to deny a targeted defendant of a fair trial, or fair judicial proceeding, or due process, that confers common law immunity to the actor beyond existing "in court" testimony provided under *Briscoe v. Lahue*, 460 U.S. 325, 103 S.Ct. 1108, 75 L.Ed.2d 96 (1983)?

2. Whether the "presumption of innocence" normally associated with "silence" under the First and Fifth Amendments can be totally disregarded and *mens rea* culpability attach to a targeted defendant for an alleged commission of a prosecutor sponsored offense, where the probative evidence is dictated solely by the mental interpretation of the sponsor's own word usage? (Thought crime.)

3. Did a Federal Court of Appeals abuse its discretion, when in seeking an affirmation of summary judgment for respondents, in direct conflict with facts and inferences of the nonmovant, machinates an unaddressed theory of probable cause from evidence never subjected to cross-examination and auspiciously supported by the court's fabrication of an event at trial that <u>did not</u> take place?

4. Did respondents effectively deny petitioner of his First Amendment right to full, fair and adequate access to the courts, when respondents disregarded court-ordered discovery by ignoring specific requests and subpoenas for evidence necessary at trial to the right of a full and effective cross-examination secured by and incorporated in the Confrontation and Compulsory Process Clauses of the Sixth Amendment of the United States Constitution?

## PARTIES TO THE CASE

The parties to the proceedings below were the petitioner Frederick J. King and the respondent Stephen Goldsmith, as originally named in the Sec. 1983 complaint, who was prosecutor for the state and Marion County. Goldsmith was granted absolute immunity by the district court and petitioner appealed. The Seventh Circuit ruling that all respondents must be dismissed before they would permit review. When all respondents were dismissed and petitioner appealed, the Seventh granted absolute immunity to respondent Goldsmith in *King v. Goldsmith*, 897 F.2d 885 (7th Cir. 1990) and remanded on the remaining respondents. Later, *Burns v. Reed*, 111 S.Ct. 1934 (1991), was decided, a case of prosecutor giving legal advice, a claim which petitioner has also continued to pursue. The Seventh Circuit refused to revisit petitioner's claim in spite of the

*Burn*'s ruling. All respondents are now dismissed as previously required by the Seventh Circuit for federal judicial economy and is properly named on the cover.

The second respondent is Sgt. Gerald Young of the City Controllers Office and designated head of the operation in question by prosecutor Stephen Goldsmith.

The final respondent is Detective John Patterson of the Indianapolis Police Department.

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The petitioner, Frederick J. King, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Seventh Circuit Court of Appeals entered in this proceeding on April 5, 1994.

## OPINION BELOW

The memorandum decision of the Court of Appeals for the Seventh Circuit was unpublished under Circuit Rule 53. It is copied in the appendix hereto, page 1A.

## JURISDICTION

Invoking federal jurisdiction under 42 U.S.C. Section 1983, the petitioner brought this suit in the United States District Court for the Southern District of Indiana, Indianapolis Division on December 16, 1986. On October 30, 1991, the District Court granted summary judgment.

On petitioner's appeal, the Seventh Circuit on April 5, 1994, entered a judgment and an opinion affirming the District Court's summary judgment in favor of respondents. The Seventh Circuit used no part of the District Court's opinion, choosing instead to make its own determinations.

On July 6, 1994, petition for rehearing filed by petitioner and suggestion for rehearing en banc filed by amicus curiae were denied.

On September 27, 1994 Justice Stevens ordered that the time for filing this petition for writ of certiorari be extended to and including December 3, 1994.

The jurisdiction of this Court to review the judgment of the Seventh Circuit is invoked under 28 U.S.C. Section 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner brought federal suit pursuant to 42 U.S.C. Sec. 1983 and 1985. FIRST, FOURTH, FIFTH, SIXTH, EIGHT, and FOURTEENTH AMENDMENTS and ARTICLE IV OF THE CONSTITUTION

INDIANA STATE STATUTES INVOLVED

35-41-5-1 Attempt

35-43-4-2 Theft; receiving stolen property

The text of these provisions is set forth in the appendix C of this petition.

## STATEMENT OF THE CASE

On December 16, 1986, petitioner instituted this damage action, sounding in malicious prosecution, pursuant to 42 U.S.C. Sections 1983 and 1985. The complaint alleged that during the period from October 1981 until May 1988, that the Marion County Prosecutor and two police officers (the respondents herein) had acted in furtherance of an "agreement and conspiracy" with one James Warden--a deputy prosecutor under the direction and control of the respondent prosecutor--to deprive petitioner of his civil and constitutional rights secured by the First, Fourth, Fifth, Sixth, Eight, and Fourteenth Amendments.

The alleged "agreement and conspiracy" involved presentation of misleading testimony by the respondents known to be false due to factual and knowledgeable omissions that would have eviscerated the probable cause affidavit.

The purpose of this prosecutor sponsored attempted entrapment of petitioner (so-called reverse sting) was to bring about petitioner's indictment and prosecution for attempt to receive stolen property that was not stolen but was alleged so though an innuendo spoken into an audio tape recorder and subject to only the respondents' chosen interpretation. This prosecutor sponsored crime was attempted twice and resulted in a two count indictment, one for the November 23, 1981 transaction and the second for the December 10th, 1981 transaction. (Hereon Nov. 23rd and Dec. 10th transactions).

That in furtherance of the "agreement and conspiracy," the respondents denied petitioner of every subpoena issued (five in all) by petitioner for evidence and depositions of eye witnesses testimony necessary for both a defense and to present the facts to the jury. That respondents

further denied, concealed, and suppressed specifically requested exculpatory and impeaching evidence by lying to defense counsel that such evidence was lost, when in fact it was not, to dissuade counsel from presenting a viable defense. Respondents also denied petitioner of independent analysis of crucial evidence (the audio tape recording) to conceal the truth from the jury and permit the respondents' prejudicial and misleading use of that evidence to support their perjury, subornation of perjury, falsification and misrepresentation of evidence. The respondents knew their misrepresentation did not exist, was in fact vouched for by the deputy prosecutor and known by the deputy prosecutor to be fraudulent but was not corrected by the deputy prosecutor.

Upon petitioner's arrest, he was held in custody under $60,000.00 bond, an excessive amount in light of the facts of

this case, a nineteen year resident of the state with a family, and a home owner. He was thereafter brought to trial on November 9-10, 1982 and found guilty of the Nov. 23rd transaction and not guilty of the Dec. 10th transaction. The audio tape recording, suppressed evidence, and both verdicts are instrumental in petitioner's proof of his allegations of a conspiracy.

The present Sections 1983 and 1985 controversy finds its origins in complaining officer witnesses' conspiracy with and under direct orders of a prosecutor whose obvious conflict of interest is in his malicious prosecution and cover up of his own sponsored entrapment crime.

## REASONS FOR GRANTING THE WRIT

I. The "presumption of innocence" is axiomatic, and should not be eviscerated solely by the government's allegations using speculative suspicion as supportive

**of the presumption of guilt without probative proof, just because its an attempted government sponsored crime.**

This case centers upon <u>speculation</u> that a citizen, while in performance of his livelihood, is to be held culpable for the sovereign's mental intent; restricted to and based solely upon only the sovereign's racial discriminatory interpretation of its own usage of a word. *United States v. Klarriss*, 347 U.S. 612 (1954) at 617: "No man shall be held criminally responsible for conduct that he could not reasonably understand to be proscribed." The concept, that the sovereign, in your presence, whether at home, office, or place of business, may arrest you for criminal attempt, based solely upon the sovereign's alleged accusation into a tape recorder for which the sovereign has no requirement to apprise you of their mental criminal intent and interpretation, belongs in the

communist system, not in the United States judicial system. Whether the accusation is drug dealing or as a dissenter of the state, your lack of response as probative evidence to support the sovereign's belief, that you have only chosen the sovereign's criminal intent, is not only a slap in the face of reason and logic, but is an affront to the "presumption of innocence" for which the United States Constitution protects. *In Re Winship*, 397 U.S. 358, 363 (1969)

All state and Federal court rulings have directly relied upon this unconstitutional premise, determining, that it is of no consequence, as a matter of law, that petitioner didn't hear, misunderstood, did not believe, or chose not to believe respondent's usage, or in fact didn't have knowledge of the respondents' intended racial interpretation of a commonly used word. The word "hot" is consistently used in business, such as in

petitioner's Coin and Stamp trade, advertising, stock brokers, and even the law. (See Appx D). The normal usage being that of good seller, fast seller, an item in demand, or "hot" issue to name just a few.

In other words, ***Petitioner's failure to read minds is the factual evidence upon which he was arrested.*** Corruption of the truth seeking process was the evidence upon which petitioner was convicted. Suspicion and speculation is the evidence upon which petitioner's conviction was affirmed.

The respondents' cynosure at trial was that when blacks use the word hot it means stolen (TR64 L11-14), elevating two fallacies into a one general proposition. First, that "hot" can only mean stolen, and second that "hot" must mean stolen because that is the only usage by a black of that word. The latter generalization is unsupported by ordinary human experience to

encompass a whole ethnic group, the former is too vague, too common and lacks empirical data to justify it as evidentiary law. Not only is the respondents' usage discriminatory, but to inflict such a narrow interpretation is a violation of the petitioner's First Amendment right to free thought, free expression, and to be free of government censorship. That kind of censorship should not be permitted to dictate what the citizen must believe, to what opinions he must hold, and limited to only the sovereign's alleged dishonest mental intent at the sovereign's whim or caprice.

*Wooley v. Maynard*, 430 U.S. 705, 97 S.Ct. 1428, 51 L.Ed.2d 752 (1977) at 430 U.S. 714:

> ... the proposition that the right of freedom of thought protected by the First Amendment against state action includes the both the right to speak freely and the right to refrain from speaking at all. See *Board of Education v. Barnette*, 319 U.S. 624, 633-634, 63 S.Ct. 1178,

1182-1183, 87 L.Ed. 1628 (1943); *id.*, at 645, 63 S.Ct., at 1188 (Murphy, J., concurring). A system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts. The right to speak and the right to refrain from speaking are complementary components of the broader concept of "individual freedom of mind." *Id.*, at 637, 63 S.Ct., at 1185.

II. The Supreme Court needs to correct the erroneous judgment of the Seventh Circuit when the circuit court disregarded Supreme Court Law that requires facts and inferences to be drawn in favor of the non-moving party, by supplanting petitioner's facts supporting his presumption of innocence with a dubious "acquiescence of silence" theory that had allegedly been placed before the jury though cross-examination, an event unsupported by the record.

The Seventh Circuit, recognizing that probable cause was insufficient in the probable cause affidavit and was also lacking at trial, machinated a previously

unsolicited speculation, that petitioner's sole reason for his silence was "acquiescence."

> "Failure to contest an assertion, however, is considered evidence of acquiescence only if it would have been natural under the circumstances to object to the assertion in question. 3A Wigmore Sec. 1042." *United States v. Hale*, 422 U.S. 171, 95 S.Ct. 2133, 2136 (1975).

It is intuitively obvious that if petitioner did not hear there would be no reply, and if he did hear, he may have interpreted "hot" to mean good seller. Also, he may even have been indifferent. Petitioner, in compliance with the special license issued by respondents, recorded the sale in a log book maintained specifically by request of, and for respondents for that very purpose. It was established that petitioner paid fair market value. In light of the silence determination made by the Seventh Circuit, which eviscerates the officers sworn trial testimony and presentation of evidence by an audio tape

and transcript of that tape that petitioner responded, there was not a scintilla of probative evidence that petitioner acted or said anything in furtherance of Patterson's *mens rea*. Patterson admits he had made no effort to further indicate his intent or to apprise petitioner of his interpretation.(TR40 L11-14, TR62-3). In other words, petitioner's *mens rea* is up for grabs. *United States v. Cruz-Juninez*, 977 F.2d 95 (3rd Cir. 1992) at 102 citing the Model Penal Code Sec. 5.01 as "well settled principles of the law of attempt." "if substantial steps are the only proof of the defendant's criminal intent, then these steps must unequivocally evidence such an intent; "that is, it must be clear that there was a criminal design and that the intent was *not* to commit some non-criminal act." The *Cruz-Juninez* court at 101 quoting *United States v. Oviedo*, 525 F.2d 881, 885 (5th Cir. 1976):

> "the objective acts performed [by the defendant], without any reliance on the accompanying *mens rea*, mark the defendant's conduct as criminal in nature[; t]he acts should be unique rather than so common place that they are engaged in by persons not in violation of the law."

The Seventh Circuit's sole reliance on speculation and mind reading can not be said to meet the above criteria, the other circuits criteria, or the Model Penal Code.

It is petitioner's position, as supported by the Indiana Statute commentaries on the Federal Model Penal Code Sections 5.01 and 223.6 (5 & 6), which in particular, discusses exceptions for 2nd hand dealers. It is up to respondents, not petitioner, to determine as to whether Patterson was or was not a thief. Petitioner has no prior knowledge of its character, since the police keep that information to themselves. Unlike drugs, it is not facially illegal to own or possess silverware. This may also establish a

possible classed-based animus. *Bretz v. Kelman*, 773 F.2d 1026 (9th Cir. 1985) Note #6. If not, surely it is reverse discrimination that presumes that whites are to be held culpable because blacks are automatically thieves when they use the word hot.

Silence has been constitutionally recognized and protected under both the First and Fifth Amendments. Its use as evidence by which to draw an inference would have to be highly probative to overcome the presumption of innocence. There is nothing in the record of petitioner's testimony that is inconsistent with his claim of innocence. "In light of the many alternative explanations for his pretrial '<u>silence</u>,' it is insufficiently probative to warrant admission of evidence thereof." *United States v. Hale*, 422 U.S. 171, 95 S.Ct. 2133, 45 L.Ed.2d 99 (1975). at 2138. There is simply nothing to

indicate which interpretation is more probably correct, petitioner's, respondents', or the Seventh Circuit's; but it must be remembered, that it is only the respondents who actually know what is in their minds. One ought to be wary of causal generalizations that read well but "do not wash." *United States v. Hale*, 422 U.S. 171, 95 S.Ct. 2133, 2139 (1975).

The Seventh Circuit's use of the suppressed April 27th L.H. to speculate of another person's "silence," without any consideration of the many other possibilities is censorship.

> "In most circumstances silence is so ambiguous that it is of little probative force. For example, silence is commonly thought to lack probative value on the question of whether a person has expressed tacit agreement or disagreement with contemporaneous statements of others. See 4 Wigmore Sec. 1071." *United States v. Hale*, 422 U.S. 171, 95 S.Ct. 2133, 2136 (1975).

Further, the lack of right to cross-examination of the April 27th L.H. testimony is improper and borders on

constitutional infringement.

> "Lack of opportunity to cross-examine is of crucial importance in determining full and fair opportunity to litigate the probable cause issue." *Bailey v. Andrews*, 811 F.2d 366 (7th Cir. 1987) at 370:
>
> "Raised but not decided in *California v. Green*, 399 U.S. 149, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970). "Prior statement," not itself subjected to cross-examination and other safeguards of testimony at trial, is admitted as substantive evidence." *Delaware v. Fensterer*, 474 U.S. 15, 106 S.Ct. 292, 88 L.Ed.2d 15 (1985).

The Seventh Circuit irresponsibly used the officer's belief and petitioner's silence, as testified to at the April 27th L.H., as though it was probative evidence of probable cause. A belief whether the moon is made out of green cheese, no matter how much the officer really believes that, it is still mere suspicion without any probative proof. "Probable cause denotes more than mere suspicion, but does not require certainty." *United States v. Ellery*, 678 F.2d 674, 677 (7th Cir. 1982) *cert. denied* 459 U.S. 868, 103 S.Ct. 150,

74 L.Ed2d 126. The Seventh Circuit did not even address petitioner's claim of respondents' violation of *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978). The omissions in the probable cause affidavit would not only have established petitioner's innocence but Patterson's failure to entrap petitioner into a prosecutor sponsored crime. The court also failed to address the effect that 'good seller' inserted for "hot" would have had on the sufficiency of the affidavit. Inserting 'good seller' would leave nothing to even remotely imply there was a crime being committed. The court's reliance upon the suppressed April 27th L.H. to extract probable cause is misplaced. It took place some four months after the Nov. 23rd and Dec. 10th transactions. This conflicts with the Seventh Circuit's own previous reliance in *United States v. McNeese*, 901 F.2d 585 (7th

Cir. 1990) at 593: "The *Gates* court reminds reviewing courts that after the fact scrutiny...of the sufficiency of an affidavit should not take the form of de novo review." *Illinois v. Gates*, 462 U.S. 213, at 236, 103 S.Ct 2317, at 2331, 76 L.Ed.2d 527 (1983).

The Seventh Circuit stated that it would be considered wise not to respond after receiving information of the kind (Patterson's hot statement). Where is this so commonly known within the community as to be indisputable among reasonable men, or which is capable of certain verification through recourse to reliable authority. *United States v. Mendell*, 447 F.2d 639, 641 (7th Cir.) cert. denied 404 U.S. 991 (1971). *Jacobson v. United States*, 112 S.Ct. 1535 (1992) says that government sponsored crimes have to prove predisposition. Where in the record, without speculation, can one find a

scintilla of evidence to support predisposition, or intent, or any act on the part of petitioner, overt or otherwise, that unequivocally points to an attempt of any crime other than the wish to carry on his right to a livelihood and to be unmolested by the government.

**III. The Supreme Court needs to remand so that the Seventh Circuit may properly apply civil law in the light of petitioner's facts and reasonable inferences, as drawn from those facts supported by the record, instead of its own fabrication, which are unsupported by the record.**

The Seventh Circuit blatantly ignored Supreme Court and even its own circuit law, which requires, that petitioner's facts and all reasonable inferences must be drawn in the light most favorable to the nonmovant. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-50, 106 S.Ct. 2505, 2509-2511, 91

L.Ed.2d 202 (1986). *DeValk Lincoln Mercury, Inc. v. Ford Motor Co.*, 811 F.2d 326, 329 (7th Cir. 1987).

Petitioner has argued that the end of the untranscribed portion of the poor audio tape recording contains a "colloquial," where Patterson stated: "We got the bones right in him and he didn't even know it.", and Jarman agreed. This black slang, which could be testified to by numerous blacks, that what ever the black officers sold petitioner, they had successfully concealed its true nature. The officers swear they are talking about a dog with a bone in a window. However, there was neither a dog, a bone (PCR99 Exh C), and they conceded at trial there was no window. (TR119 L18-19). Respondents knew moments after, if not during the Nov. 23rd transaction that, they had failed to pass on their *mens rea* knowledge of the silverware. They also knew they could not establish petitioner's *mens*

*rea*. Petitioner made no verbal response, he quoted the same rate before as after the attempted change in character, he paid the current market value of silver as of that day set by the owner, (not by the theft market but the bullion market), he recorded the sale, it was still being held along with every item purchased since obtaining the 2nd Hand Dealers License six months before so the police could make their determinations before shipping it to the smelter.

Respondents, knowing they had failed to pass on *mens rea* to petitioner, may be one of the reasons the audio tape was used to add two more unrelated sting operations to petitioner's trial tape. This lack of concern for the lost or damage of such crucial evidence that destroys a man's career is rather callous. Was this actually the cause of the poor audio quality, or was this merely a ruse to keep petitioner's

defense counsel from independent analysis and presentation of the truth to the jury?

Had petitioner's counsel been permitted to obtain either the requested independent analysis of the audio tape, the depositions of the eye witnesses for which the prosecutor refused to permit on May 3, 1982, or the suppressed April 27th L.H. transcripts, counsel would have been able to pursue the officers' true meaning of their colloquial. As stated above, petitioner emphasizes, that the complaining officer witnesses' prior conflicting statements from the suppressed April 27th L.H. were crucial to defense; that there was a real possibility that pursuit of the inconsistent and impeachment evidence would have done serious damage to the respondents' case.

**IV. It is a not only a miscarriage of justice but unconscionable to give judicial permission to officials to corrupt the**

**truth seeking process in order to convict an innocent citizen for misconceiving or failure to agree with the sovereign's intended racial discriminatory beliefs.**

Respondents conspired to violate petitioner's constitutional rights though abuse of their authority and corruption of the truth seeking process.

(1) The respondents conspired to fabricate probable cause for the prosecutor when they sponsored this crime by a dishonest and misleading affidavit, which violated petitioner's Fourth Amendment rights established under the *Franks* rule. The respondents did so by:

(a) Application of an unconstitutional premise: Requiring petitioner to have the same dishonest belief as the respondents.

(b) Withholding material facts: That respondents knew petitioner had failed to understand both their mental intent and interpretation. There was nothing done or

said by petitioner that supported their attempt to convey their alleged dishonest belief.

(c) Misrepresenting the truth in the probable cause affidavit: That is, they knew they had failed to apprise petitioner of their intent and had not indicated or told petitioner it was stolen but only accomplished telling such information to a tape recorder, which they knew neither established probable cause nor was a crime.

(2) Respondents violated petitioner's rights under the due process clause of the Fourteenth Amendment and under the Confrontation Clause of the Sixth Amendment when they lied to petitioner's criminal defense counsel that the April 27th L.H. evidence was lost to dissuade him from presenting a viable defense of "silence." This denied counsel of full and effective cross examination; denied counsel the ability to impeach the witnesses sworn

testimony, and to refute the misrepresentation and falsification of evidence that petitioner had made a knowledgeable response, when in fact respondents knew there was no such response.

(3) That respondents violated petitioner's rights under the due process clause of the Fourteenth Amendment and the Compulsory Process Clause of the Sixth Amendment when they denied petitioner's counsels the right to subpoena eye witnesses for depositional testimony in order to offer a viable defense of silence as supportive of lack of knowledge for the Nov. 23rd transaction; a defense that had succeeded for the finding of not guilty by the jury for the Dec. 10th transaction.

(4) That respondents, in furtherance of violating petitioner's rights under the due process clause of the Fourteenth Amendment, conspired to impede and obstruct

justice by: (a) Denial of independent analysis of the poor audio tape recording to establish the truth that in fact there was no knowledgeable response. (b) That respondents violated petitioner's rights established in *Brady* and the *Jencks* Act, when they conspired to suppress the specifically requested April 27th L.H. which contained evidence of the complaining officer-witnesses' prior statements that petitioner made "no verbal response." This contradicted their prejudicial and misleading sworn trial testimony and the misrepresentation of physical evidence that petitioner had made a "verbal response." The respondents also refused to honor any of the subpoenaed evidence for use at trial necessary to presentation of all the facts to the jury and for petitioner's constitutional right to present a defense. *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) and *United*

*States v. Bagley*, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985)(prosecutors failure to disclose requested impeachment evidence violated due process). (c) That respondents conspired to commit perjury and to suborned perjury of Officer Yolanda Jarman, who had never heard the tape and testified at the April 27th L.H. that petitioner had made no verbal response, at trial now testified that petitioner made a "verbal response," a fact respondents knew was not true. The false testimony was vouched for by the prosecutor and left uncorrected. *Pyle v. State of Kansas*, 317 U.S. 213, 216, 63 S.Ct. 177, 178, 87 L.Ed. 214, 216 (1942)(known use of coerced or perjured testimony is a violation of constitutional rights). *Napue v. Illinois*, 360 U.S. 264, 269, 79 S.Ct. 1173, 1177, 3 L.ed.2d 1217 (1959)(Allowing false testimony to appear uncorrected is against "rudimentary demands of justice").

(d) That respondents fabricated evidence prejudicial by way of a transcript to misrepresent that petitioner made a knowledgeable response, a fact respondents knew did not exist. It too was vouched for and left uncorrected by the prosecutor to conceal the truth from the jury. *Mooney v. Holohan*, 294 U.S. 103, 112, 55 S.Ct. 340, 342, 79 L.Ed. 791, 794 (1935)(deliberate deception of the court and jurors by presentation of known false evidence is incompatible with "rudimentary demands of justice"). *Miller v. Pate*, 386 U.S. 1, 87 S.Ct. 785, 17 L.Ed.2d 690 (1967)(If prosecution deliberately and intentionally misrepresents the truth--such as by knowingly using false evidence, due process is denied). *Miller*, a factually similar case, was reversed by this court and remanded back to the Seventh Circuit. In *Miller*, the prosecution presented evidence that the victim's blood was on defendant's

shorts, when it was actually paint; the prosecution arguing the same as the Seventh Circuit does now, that everyone in the court knew that the evidence was misrepresented.

The Seventh Circuit ruled that the issue of "silence" for the Nov. 23rd transaction was squarely placed before the jury through petitioner's trial counsel's cross-examination; an event that is <u>not</u> supported by the trial record. Trial counsel questioned only the discrepancy between the two different transcript "<u>responses</u>." Counsel did not indicate, suggest, or even infer silence in any way for the Nov. 23rd transaction. Neither did respondents, despite ample opportunity. However, respondents did readily admit to "silence" for the Dec. 10th transaction and also claimed that they <u>believed</u> petitioner understood. It is undisputed the jury found not guilty for the Dec. 10th

transaction. This is exactly the same reliance of belief the Seventh Circuit now attempts to apply belatedly to the Nov. 23rd transaction. The jury found not guilty for "silence," why does the logical inference evade the Seventh Circuit?

If counsel had been permitted to obtain any part of the requested court ordered discovery, then he could have argued that the first transcript did not show a knowledgeable response and squarely brought the issue of silence before the jury, as the Seventh Circuit now belated theorizes and speculates for respondents.

> "It is the burden of the moving party to show that there was no other rational ground upon which the final judgment was based than the issue which it seeks to preclude in the present litigation." *Davis & Cox v. Sumna Corp.*, 751 F.2d 1507, 1518-19 (9th Cir. 1985).

It also could be viewed, that on the basis of the limited cross-examination, without any of the specifically requested evidence, the jury might well have thought

that trial counsel was engaged in speculative and baseless line of attack on the credibility of an apparently blameless witness. As the respondents established, by discrediting their own first transcript as done by some unknown secretary, that the second, they claimed, was credible because it was done by the producer of the tape and vouched for by the prosecutor. Irrespective of what the Seventh Circuit chooses to speculate, this alleged "response" was the evidence presented to the jury, not the Seventh Circuit's machination.

(6) Respondents violated petitioner's Eight Amendment right to be free from a conspiracy to obtain a fraudulent conviction of one who was actually innocent. *Jones v. City of Chicago*, 856 F.2d 985 (7th Cir. 1988) at 994.

> "They [two police officers] had a hunch he [Jones] was guilty and were not going to let a mere absence of evidence stand in their way."

**V. The circuits are in need of guidance as to what is or is not considered a full and fair hearing under the exception doctrine of Allen v. McCurry, 449 U.S. 90, 103, 101 S.Ct. 411, 419, 66 L.Ed.2d 308 (1980).**

> "As a general matter, even when issues have been raised, argued, and decided in a prior proceeding, and are therefore preclusive under state law, redetermination of the issues may nevertheless be warranted if there is reason to doubt the quality, extensiveness, or fairness of procedures followed in prior litigation." Haring v. Prosise, 462 U.S. 306, 103 S.Ct. 2368, 76 L.Ed.2d 595 (1983) at 317-18.

The Supreme Court has not had an opportunity to address the boundaries, limitations and requirements that may encompass the full and fair hearing exception requirement under *Allen v. McCurry, supra.* The circuits are sparse as to any guidance other than vague references to minimal due process. Does minimal due process consist of the mere fact you are required to appear in court, but are

hermetically sealed from presenting evidence and testimony in your behalf? A mere formal right of access to the courts does not meet First Amendment Constitutional requirements. Courts have required that the access be "adequate, effective, and meaningful." *Bounds v. Smith*, 430 U.S. 817, 821, 97 S.Ct. 1491, 1495, 52 L.Ed.2d 72 (1977). Some issues in this case that may fail to meet either minimal due process or the requirements for a full, fair, and adequate proceeding are:

1. The trial court ignored its own court ordered discovery and permitted respondents to: deny petitioner of every (six in all) individually and specifically requested pieces of evidence necessary to present a defense. The suppressed evidence was also necessary to impeach, to rebut fraudulent evidence, and to present the truth to the jury. The trial court, by its "acquiescence of silence," condoned the

respondents' constitutional violations that effectively denied petitioner of his Sixth Amendment right to effective assistance of counsel. The court further permitted perjury, subornation of perjury, use of fraudulent evidence, and misrepresentation of evidence during trial. Then, at post trial, disallowed incorporation of the only one of six pieces of requested evidence to surface, that of the April 27th L.H. into appellate review until after the direct appeal. The suppressed hearing contained inconsistent and impeaching prior statements of the key officer-witnesses directly contradicting the trial testimony.

2. In *King v. State*, 469 N.E.2d 1201 (1984) the court cited verbatim the 2nd transcript showing the fraudulent response as evidence relied on by the jury in affirming the conviction. It would be reasonable that if the appellate court believed this and was prejudiced by the

false response, so was the jury. The Indiana Appellate Court and the jury, were without the benefit of the suppressed April 27 L.H. The Indiana Appellate Court did not listen to the tape and therefore could not possibly confirm or disaffirm a response. In PCR appeal, *King v. State* (unpublished) 49A04-8607-PC-229, when confronted with the fraud of the tape, the court still unable to confirm its content, did not bother to listen to the tape, but ruled that an inference of guilt was drawn instead by the jury from the tape. This conflicted with the previous ruling that the jury had drawn guilt from the 2nd transcript. Which is it? The Seventh Circuit discarded both theories and determined guilt from petitioner's "silence;" blind to the trial evidence of a "verbal" response. To do so, the jury would have given no credibility to three police officers' sworn testimony of a response, no credibility to the evidentiary

misrepresentation that the tape contained a response, and no credibility to the prosecutor's vouching. Repeating *Hale, supra*, at 95 S.Ct. 2139,

> "One ought to be wary of causal generalizations that read well but do not wash."

3. In the PCR hearings, the judge made it plain that he believed the suppressed evidence had been viewed by the Indiana Court of Appeals. Even when it was brought to his attention that he was the one who denied its incorporation into the record, he still remained hostile toward its review.(PCR150-151). The judge ruled that it was not suppressed evidence because he claimed he had ruled that the prosecutor need not produce that which the prosecutor physically did not have in its files or didn't intend on using.(PCR148,150). With this obviously erroneous premise, *United States v. Bryant*, 439 F.2d 642, 142 U.S. App. D.C. 132 (1971), the court then

promptly misapplied Supreme Court Law established in *United States v. Agurs*, 427 U.S. 97, 112, 96 S.Ct. 2392, 2401, 49 L.Ed.2d 342 (1976) using *Agurs* Type III law (newly discovered evidence unknown to the prosecution) to affirm the conviction, when it was unequivocal that only *Agurs* Type I and II applied (finally discovered or suppressed but known by the prosecution).

4. Both the PCR appellate court and petitioner's appellate counsel (not PCR hearing counsel) were denied the benefit of a complete transcript of the PCR proceedings for review until after the decision making process. The missing transcript (PCR157A) contained testimony and physical evidence that had been presented in petitioner's behalf. Of crucial importance was petitioner's trial counsel's sworn testimony that he was told by respondents that the specifically requested April 27 L.H. tape was

lost.(PCR157A Pg11). The respondents had established that it was not lost. Therefore, they inadvertently admitted they had lied to defense counsel to dissuade him from obtaining crucial evidence detrimental to their case and necessary to the presentation of a viable defense as well as material impeachment evidence of the complaining key officer witnesses. This would have unequivocally established a *Brady* violation, for which the Indiana Appellate Court, without the complete transcript had no opportunity to fully address that issue.

The Seventh Circuit stated in *Brecht v. Abrahanson*, 944 F.2d 1363 (7th Cir. 1991).

> "*Chapman* establishes that the standard an appellate court should employ on direct review is whether the error is harmless beyond a reasonable doubt. Does this carry over to a collateral attack? The Supreme Court has never addressed that question."

*BRISCOE V. LAHUE*

EXPANSION OR BLANKET IMMUNITY?

**VI. The Supreme Court needs to give guidance to the circuits for expansion of immunity granted in Briscoe v. Lahue, 460 U.S. 325, 103 S.Ct. 1108, 75 L.Ed.2d 96 (1983)**

The decision below granting common law witness immunity to complaining officer-witnesses, who allegedly conspired with a prosecutor to fabricate evidence, misrepresent evidence, committed and suborned perjury, denied analysis of crucial evidence to present the truth at trial, suppressed specifically requested evidence for trial, and refused to honor subpoenaed evidence for trial raises important and unresolved issues that are dividing all the federal circuits.

The Seventh Circuit's lack of probative evidence to support its newly contrived theory of "acquiescence" by

silence resorted to sheer speculation and eschewed from addressing other equally possible explanations that would more closely support the "presumption of innocence." The court in the end turned upon an unprecedented expansion of *Briscoe v. LaHue, supra* to grant immunity for not only perjured testimony but for any and all corrupt acts that obstruct the truth seeking process.

The Supreme Court granted immunity to witnesses under *Briscoe v. LaHue*, but withheld that immunity from <u>complaining</u> witnesses at common law. *Malley v. Briggs*, 475 U.S. 335, 340-1, 106 S.Ct. 1092, 1096, 89 L.Ed.2d 271 (1986)

1. The Fifth, Seventh, and Eleventh Circuits do not grant immunity for persons who knowingly submit false testimony for probable cause determinations. This specifically included the use of misleading information and the intentional withholding

of material information under *Franks v. Delaware*, 438 U.S. 154, 156, 165-71, 98 S.Ct. 2674, 2676, 2681-84, 57 L.Ed.2d 667 (1978). Without addressing petitioner's claims under *Franks*, the Seventh Circuit granted immunity in this case.

2. The Supreme Court and the Second Circuit do not grant immunity to complaining officer witnesses. *Briggs, supra.* The Seventh Circuit granted immunity in this case.

3. The Supreme Court and the Second Circuit do not grant immunity to complaining officer witnesses suborning of perjury. *Dennis v. Sparks*, 449 U.S. 24 (1980). The Seventh Circuit did grant immunity in this case.

4. The Supreme Court and the Fifth Circuit do not grant immunity to complaining officer witnesses' concealment or suppression of evidence. *Manson v. Brathwaite*, 432 U.S. 98, 97 S.Ct. 2243, 53

L.Ed.2d 140 (1977). (No immunity for evidence deliberately concealed). The Seventh Circuit did not grant immunity in *Schertz v. Waupaca County*, 875 F.2d 578 (7th Cir. 1989), but has done so in this case in direct contrast to the prior decision.

5. The only circuit known that grants immunity to complaining officer witnesses' fabrication of evidence is the Seventh.

6. The only circuit known that grants immunity to complaining officer witnesses' misrepresentation of evidence is the Seventh.

7. The First, Second, and Eleventh Circuits do not grant immunity to complaining officer witnesses that conspire with a prosecutor to give false testimony. The Sixth, Seventh, and Tenth Circuits do grant immunity to conspiring witnesses, but has not addressed conspiring complaining witnesses.

8. The Second and Fifth Circuits do not grant immunity to a prosecutor who enters into a conspiracy with complaining police officers to commit perjury. The Sixth, Seventh, and Tenth Circuits do grant immunity.

The central question becomes, do acts off the witness stand, such as a conspiracy to present fraudulent evidence, conspiracy to misrepresent evidence, and conspiracy to fabricate false testimony, be permitted to be performed with the same impunity given only to an individual witness in court?

First and Second circuits do not grant immunity to conspiracies to present false testimonies. The Sixth, Seventh, and the Tenth extend *Briscoe* immunity to conspiracies to commit perjury. Information taken from *Hunt v. Bennett*, 17 F.3d 1263 (10th Cir. 1994) at 1267. "There is, of course the possibility that despite the truth-finding safeguards of the judicial

process, some defendants might indeed be unjustly convicted on the basis of knowingly false testimony..." *Briscoe* 460 U.S. at 345, 103 S.Ct. at 1120. The circuit courts embrace this concept to further expand *Briscoe* without seeking Supreme Court advice.

Petitioner believes the basis for this approach is not governed in the United States Constitution, but in the reminiscent of the German Law of the Nazi period "that anything is punishable if it is deserving of punishment according 'to the fundamental conceptions of penal law and sound popular feeling.'" *United States v. Berrigan* 482 F.2d 171, 189, n. 39 (3rd Cir. 1973).

But a ray of hope may exist to save the sacrificing of the few so that we can punish the many. In *Brecht v. Abrahanson*, 944 F.2d 1363 (7th Cir. 1991) the court stated:

"One dominant theme is that doctrines protecting the innocent, and claims of actual innocence, receive special protection. See *Murray v. Carrier*, 477 U.S. 478, 469 (1986)(the "cause and prejudice" preconditions to collateral review of claims forfeited in state court do not apply "where a constitutional violation has probably resulted in the conviction of one who is actually innocent."); *Kuhlmann v. Wilson*, 477 U.S. 436, 452-54 (1986)(showing of probable innocence is condition of second review of same issue)."

VII. In light of the ruling in Burns v. Reed, 111 S.Ct. 1934 (1991) where a prosecutor is only entitled to qualified immunity for legal advice, all the Federal Circuits need guidance to determine absolute or qualified immunity of a prosecutor, when he may have a conflict of interest, that is when he conspires to violate a citizen's constitutional rights by fabricating, directing, and prosecuting his own sponsored crime and then covers up the bad acts of his coconspirators.

Prosecutor-respondent Stephen Goldsmith devised and sponsored his own

entrapment crime in which he then could prosecute and cover up any corruption of the truth seeking process necessary to his machination. This is a conflict of interest. "A prosecutor who faces a conflict of interest is in a poor position to act impartially as a judge who predetermines a judicial proceeding." *Beard v. Udall*, 648 F.2d 1264 (9th Cir. 1981). The question unaddressed by the Federal courts has been whether absolute or qualified immunity attaches when the prosecutor both fabricates, directs and advises, and then covers up the bad deeds of those he used to corrupt the truth seeking process.

The rule addressed by the Supreme Court for the Seventh Circuit in *Burns v. Reed*, 111 S.Ct. 1934 (1991) is that a prosecutor is entitled to only qualified immunity for giving such legal advice to police officers. The Tenth Circuit in

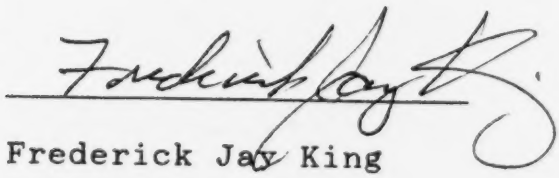
*Wolfenbarger v. Williams*, 826 F.2d 930 (10th Cir. 1987) had previously reached that conclusion. Goldsmith's subsequent conspiracy to cover up the officers' wrong doings, and whether he directly advised them to corrupt the truth seeking process or is vicariously liable as principle conspirator, should be determinative of the prosecutor immunity issue.

## CONCLUSION

Petitioner has claimed respondents have violated a panoply of constitutional violations, including the First, Fourth, Fifth, Sixth, Eight, and Fourteenth Amendments. This is an opportunity for the Supreme Court to determine what is truly actionable under a Sec 1983 and what is not, and what are the boundaries, limitations, and rationales that affect the issues of immunities under a 42 U.S.C. Sec. 1983 action.

I herebu certify that all of the above statements are true and are made under the penalities of perjury.

Respectfully submitted,



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# APPENDIX

(Unpublished order)

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Argued March 1, 1994--Decided April 5, 1994

No. 92-1040

Before

Hon. WILLIAM J. BAUER, Cicuit Judge

Hon. JOEL M. FLAUM, Circuit Judge

Hon. FRANK H EASTERBROOK, Circuit Judge

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division

No. 86-C-1471

Sarah Evans Barker, Judge.

FREDERICK J. KING, Plaintiff-Appellant

v.

GERALD YOUNG and JOHN PATTERSON, Defendants-Appellees

## O R D E R

Frederick King appeals from the district court's grant of summary judgment in favor of the defendants in this civil rights action filed pursuant to 42 U.S.C. Sections 1983, 1985. The issue presented is whether the district court erred in determining that under Indiana rules of collateral estoppel, King is barred from relitigation of his claim that the police officers wrongfully procured his arrest and conviction by fabricating evidence and suborning perjury.

### I. BACKGROUND

King, an employee of Hoosier Coin Shop, a second hand retail shop, was arrested following a "reverse sting" operation during which undercover police officers, Patterson and Jarman twice sold items they claimed were "hot." The sales transactions were recorded by

Sergeant Young. In November of 1982, King was tried before a jury and convicted of one count of attempting to receive stolen property in violation of Indiana Code Sec. 35-43-4-2(b) and 35-41-5-1, and acquitted of the second identical charge. He was sentenced on January 4, 1983, to two years of imprisonment. The sentenced was suspended and instead King performed eighty hours of community service, served two years of probation, and paid a fine of $250.00.

Finding sufficient evidence to support his conviction, the Court of Appeals of Indiana affirmed. King v. State, 469 N.E.2d 1201 (Ind. App. 1984). King's petition for a rehearing was denied as was his petition for transfer to the Indiana Supreme Court. King next filed a petition for post conviction relief, arguing that he was entitled to

a new trial because Patterson and Young had given sworn testimony during a license revocation hearing for Hoosier Coin Shop which contradicted their testimony at his trial. Had this evidence been presented to the jury, he maintained, it would have created reasonable doubt and might have resulted in a different verdict. After a hearing, the post-conviction court concluded that this issue had been heard by the court on direct appeal and thus was res judicata. The court also noted that this was not "newly discovered" evidence, since King knew of the substance of the testimony prior to trial but only later obtained the transcript. In any event, the court found that had the transcript been available at trial it would have provided merely impeaching evidence and would not have affected the outcome of the trial. In an unpublished order the

state appellate court affirmed denial of post-conviction relief (No. 49A04-8607-PC-229, Dec. 30, 1986), and the Indiana Supreme Court denied review.

King then filed this civil rights suit under 42 U.S.C. Sec. 1983 against the prosecutor and two police officers alleging that they had violated his constitutional rights by: (1) intentionally misrepresenting and concealing information from the Magistrate, thereby causing his arrest without probable cause; (2) fabricating and withholding evidence; and (3) committing and suborning perjury. The district court granted summary judgment to the defendants on the basis of immunity and the common law defense of conviction. This court affirmed dismissal on the grounds of immunity as to Goldsmith, the prosecutor[1] (all footnotes at end of opinion), but

remanded the suit against the officers, holding the Indiana common law cannot bar relitigation of the issue of King's guilt if his conviction had been procured by fraud. King v. Goldsmith, 897 F.2d 885 (7th Cir. 1990). On remand, the district court again granted summary judgment to the defendants, this time on the ground of collateral estoppel precluded King from relitigating his claims. (District Court Order, Oct. 30, 1991). King argues that application of collateral estoppel to his claims was improper.[2]

## II. ANALYSIS

In determining whether a Sec. 1983 claim is precluded by prior state court criminal conviction as subsequent state proceedings, the federal court is required to "give state court judgments 'the same full faith and credit...as they have by law or usage in the courts

of such state.'" Welch v. Johnson, 907 F.2d 714, 719 (7th Cir. 1990)(quoting 28 U.S.C. Sec. 1738; see Leal v. Krajewski, 803 F.2d 332, 334 (7th Cir. 1986). Thus, to determine the appropriate preclusive effect to be given to state judgment, the federal court must consider: (1) whether state law would give prior state judgment preclusive effect against the claims asserted in the federal action, and (2) whether the party against whom preclusion is asserted had a full and fair opportunity to litigate the claim in state court (*i.e.*, whether the state proceedings satisfied the minimum requirements of Due Process). Allen v. McCurry, 449 U.S. 90, 104 (1980); Welch, 907 F.2d at 719; Guenther v. Holmgreen, 738 F.2d 879, 884-85 (7th Cir. 1984), cert. denied, 469 U.S. 1212 (1985).

Indiana bars relitigation if: (1) a final judgment on the merits has been

rendered by a court of competent jurisdiction; (2) there is identity of the issues actually litigated and necessarily determined to support the judgment in the prior proceeding; and (3) the party to be estopped was a party or privy of a party in the prior action. Sullivan v. American Casualty, 605 N.E.2d 134, 137 (Ind. 1992). Thus, a final judgment was clearly rendered in this case. Where collateral estoppel is defensively, as in this case, Indiana courts have historically not required mutuality and privity. Sullivan, 605 N.E.2d at 137. Finally, to determine whether the issues raised in King's Sec. 1983 action were essentially identical to previously litigated, each claim will be evaluated in turn.

A. Unlawful Arrest

King first challenges the basis of the warrant for his arrest.[3] He claims

that officer Patterson omitted the fact that King "did not respond to or otherwise acknowledge his understanding and his actions were consistent and expected of him in his livelihood." (King's Br. at 32). The district court likened this claim to the issue of whether Patterson had lied about whether he told King the silverware was "hot." (Order Oct. 30, 1991, at 7). The district court concluded that King was collaterally estopped from relitigating the issue of whether the defendants had fabricated evidence to obtain an arrest warrant for three reasons: the jury necessarily found Patterson's testimony credible, the appellate court found the evidence sufficient to support the jury's verdict, and this conclusion was held to be res judicata by the post-conviction court. King argues that this essentially equates the jury's

determination of guilt with a challenge to the integrity of the evidence relied on to establish probable cause.

As we noted in *King I*, where the arrest and conviction is allegedly procured through fraud, the focus is on the legality of the officer's conduct not on the legality of the conviction. Thus, equating the sufficiency of the evidence to convict with the issue of whether Patterson intentionally or recklessly omitted information from the warrant application was arguably error. Because these issues are distinct, and there is no evidence that the issue of probable cause to arrest has been previously litigated and actually determined, Indiana collateral estoppel law cannot preclude litigation of King's false arrest claim. See Schertz v. Waupaca County, 875 F.2d 578, 591 (7th Cir. 1989)(collateral estoppel did not

bar litigation of probable cause to arrest because claim not fairly and thoroughly addressed in preliminary hearing); Whitley v. Seibel, 676 F.2d 245, 248-49 (7th Cir.),cert. denied, 459 U.S. 942 (1982); cf. Guenther, 738 F.2d at 884 (issued barred because it had actually litigated in the state criminal preliminary hearing).

Yet the defendants maintain that the existence of probable cause was subsumed in the verdict reached by the jury and thus conclusively determined.[4] Conviction of the underlying offense, they argue, bars King's claim that he was falsely arrested. The Second Circuit in Cameron v. Fogarty, 806 F.2d 380 (2nd Cir. 1986), cert. denied, 481 U.S. 1016 (1987), provides some support for this position.[5] See also Malady v. Crunk, 902 F.2d 10 (8th Cir. 1990)(extending preclusive effect to guilty plea);

Walker v. Shaeffer, 854 F.2d 138, 143 (6th Cir. 1988)(same); Brumfield v. Jones, 849 F.2d 152, 155 n.4 (5th Cir. 1988)(discussing inter-circuit decisions on issue); McGill v. Mountainside Police Dep't, 720 F. Supp. 418 (D. N.J. 1989)(discussing split among the circuits). And in essence, this is the reasoning relied on by the district court to find that the issue of probable cause had been previously determined. However, it was this reasoning that was rejected in King's first appeal.[6] And the defendants offer no persuasive reason why the court should reconsider its earlier decision.

In support of its position that probable cause had bee previously determined, the government argued that the affidavit Patterson submitted in seeking a warrant for King's arrest supported a finding of probable cause

and that the existence of probable cause was conclusively determined and subsumed in the state's criminal proceeding and conviction of King.[7] We have addressed the preclusive effect of a conviction on conviction on the existence of probable cause above. To the extent the government's argument focuses on an ex parte application for an arrest warrant as evidence of probable cause we note that it is not preclusive in later litigation, in particular where the arrest is alleged to have been procured through fraud. The preclusive effect to be given to a prior finding of probable cause in a Sec. 1983 action for false arrest was recently considered in Simmons v. Pryor, 9 F.3d 555, 558 (7th Cir. 1993). Relying on Malley v. Briggs, 475 U.S. 335, 345, 106 S.Ct. 1092, 1098 (1986), the court held that a judicial officer's finding of probable cause to

issue a warrant is not dispositive of a subsequent civil action against the police officer for false arrest. Simmons, 9 F.3d at 558. The Supreme Court in Malley held that a judicial determination of probable cause does not prevent a suit against the police officer who sought the warrant if a reasonably well trained officer in the position of the defendant would have known that his affidavit failed to establish probable cause. Id. (discussing Malley, 475 U.S. at 345). In that case, even the officer's subjective good faith belief would not entitle him to immunity. See Mahoney v. Kesery, 976 F.2d 1054, 1058 (7th Cir. 1992). Likewise, the converse holds that if a reasonable officer would have believed there was probable cause the arrest is valid even if the officer's belief would have been mistaken. Id. at 1057-58; see

Hunter v. Bryant, 112 S.Ct. 534, 536 (1991)(per curiam). In both scenarios the standard is an objective one. Determining whether an officer's application for a warrant was objectively reasonable, requires that the court consider whether a reasonable officer under the circumstances--"'seeing what he saw, hearing what he heard'"--would have believed that the person had committed a crime. Simmons, 9 F.3d at 558 (quoting Mahoney, 976 F.2d at 1057); see Smith v. City of Chicago, 913 F.2d 469, 473 (7th Cir. 1990), cert. denied, 111 S.Ct. 2824 (1991). However, if the officer bringing the cause before the judge intentionally supplied misleading information or deliberately concealed material facts so that he knew the arrest warrant had issued without probable cause, his unreasonable conduct will not be

shielded by the facially valid warrant. United States v. Leon, 468 U.S. 897, 923, 104 S.Ct. 3405, 3421 (1984); Juriss v. McGowan, 957 F.2d 345, 350-51 (7th Cir. 1992); Olson v. Tyler, 771 F.2d 277, 281 (7th Cir. 1985); Stokes, 744 Supp. at 188. It was under these circumstances, King argues, that his arrest was made.

In order to make out a claim of false arrest, King must prove lack of probable cause. Simmons, 9 F.3d at 560. As King bears the burden of proof in the underlying action, he must do more than merely allege a lack of probable cause to survive a motion for summary judgment. See Matsushita Electric Ind. Co. v. Zenith Radio Corp, 475 U.S. 574, 587, 106 S.Ct. 1348, 1356 (1986). If he fails to present sufficient evidence to create a genuine dispute as to the underlying facts supporting the probable

cause determination, the court can decide whether probable cause exists. Maxwell v. City of Indianapolis, 998 F.2d 431, 434 (7th Cir. 1993). Although this determination is generally made in the context of a motion to suppress, id, as the defendants argue was the case here, when the question of probable cause arises in a civil rights action for false arrest, it is typically not appropriate for disposition on summary judgment, unless there is no room for a difference of opinion concerning the facts or reasonable inferences that may be drawn from them. Id. (citing Llaguno v. Mingey, 763 F.2d 1560, 1565 (7th Cir. 1985)(en banc)); Schertz, 875 F.2d at 582. In other words, only when no reasonable jury could find that the officers did not have probable cause to arrest, can the court conclude that probable cause existed as a matter of

law. Maxwell, 998 F.2d at 434. This rule applies equally to cases in which the officers misrepresented or concealed material facts in an application for an arrest warrant, as is alleged here. DeLoach v. Bevers, 922 F.2d 618, 623 (10th Cir. 1990), cert. denied, 112 S.Ct. 65 (1991). King relies on the testimony given at the licensing hearing to support his contention that at the time Patterson applied for the arrest warrant he knew that he did not have probable cause because he knew that King had not affirmatively acknowledged that the silverware was "stolen." However, even assuming that Patterson intentionally omitted the fact that King had not verbally acknowledged receipt of stolen goods, if probable cause can be established via objective information independent of the omitted fact then the existence of probable cause precludes

the claim for unlawful arrest. See Schertz, 875 F.2d at 582. King's failure to respond is not alone conclusive evidence that he was ignorant of the stolen nature of the goods. Indeed, under these circumstances it may perhaps be considered wise not to respond after receiving information of the kind. Faced with this situation, a reasonably prudent officer may have believed that King had acquiesced through silence to the commit the offense. Absent other evidence undermining probable cause, no reasonable jury could have found that the officers did not have probable cause to arrest. Thus irrespective of the deliberately omitted information, we conclude that probable cause existed as a matter of law.

B. Fabricating/Withholding Evidence

When Officer Young recorded the November 23, 1981 sting operation from a

restaurant across the mall from the Hoosier Coin Shop, static from the mall interfered, resulting in a poor quality recording of the transaction. As a result, when the recording was transcribed shortly after the transaction there were a number of blanks with the notation "inaudible." One year later, on the eve of trial, the State sent King a revised transcript of this transaction. Where the original transcript had read "inaudible" the revised transcript revealed statements by King indicating that he, in fact heard, understood, and knowingly received property represented as stolen. At trial Patterson explained that he and the prosecutor had listened to the audio tape a number of times and had revised the transcript to reflect their view. Patterson's statement reads basically the same in both transcript:"I might be

able to get a whole set of it then. This is a little hot. You might want to melt this shit down." Following this in the original transcript King's response is stated as "Yea decorate gold (inaudible)." The revised transcript reads: "Yeah, get it ready to go...no problem." Although defense counsel vigorously cross-examined the officers regarding the discrepancies in the two transcript, he refused to inquire about testimony they had given at a prior proceeding, which directly contradicted their trial testimony and the revised transcript without having the transcript as proof. The contradictory testimony referred to was given by Patterson and Jarman prior to trial at a license revocation hearing for the Hoosier Coin Shop. Most significantly, Patterson testified that during the November 23rd sting he told King that the silverware

was "hot." King, he said, "chose to ignore that statement." Officer Jarman also testified that King did not respond when Patterson told him that the silverware was "hot." "Yes, sir." she testified, "its true, no verbal response." King learned about the testimony the officer had given at the license revocation hearing from John Rousch, owner of the Hoosier Coin Shop. Although counsel made several attempts to obtain the hearing transcript before trial, it was not until after sentencing that King received a copy.

In this civil rights suit King is not directly challenging the validity of his conviction. Nor is he attacking the length or duration of his sentence, he has already satisfied the sentence imposed. Rather, like the plaintiff in Smith v. Springer, 859 F.2d 31 (7th Cir. 1988), he directly challenges the

legality of the conduct of the officers and does not impugn the integrity of the state judicial system. The Legality of the officers' conduct is distinct from the issue of whether King committed the act of receiving stolen property. It is therefore irrelevant to his Sec. 1983 action that the determination of guilt may be undermined were King to prevail on his claim of fabricated evidence and withholding of favorable evidence. To prevail on his civil rights claim King must demonstrate that the officers, while acting under color of law, deprived him of the constitutional right to a fair trial by knowingly presenting false evidence and by suborning perjury. Id at 34; Schertz, 875 F.2d at 581.

King argued in his petition for post conviction relief that the license revocation hearing transcript was clear proof that the police officers had

presented altered evidence at trial which indicated that King had responded to the "hot" statement. If confronted with this evidence, he maintained, a jury would likely acquit. The court denied relief concluding that the issue was barred by the doctrine of res judicata because the jury had sufficient evidence to infer that King believed the items were stolen, and in the alternative found that the evidence was merely impeaching, so would not likely have effected the outcome. Amicus curiae counsel argues that it is not the "effect" that the missing transcript might have had on the outcome of King's criminal trial that is at issue. In support, amicus relies heavily on LaBoy v. Zuley, 747 F.Supp. 1284 (N.D. Ill. 1990), in which a civil rights plaintiff claimed that the defendant police officers had conspired to obtain his

conviction by fabricating evidence and suborning perjury. Plaintiff LaBoy was not precluded from pursing his claim of allegedly fabricated evidence based on inconsistent testimony provided by police officers at his trial because the state court had not made an explicit finding resolving the inconsistency, but rather deemed it insufficient to effect the outcome of the case. Similarly here amicus argues that the inconsistencies King raises as evidence of fabrication were never resolved in light of his due process right to a fair trial. Counsel argues therefore that granting preclusive effect to the prior proceeding was error. However, King's case is distinguishable from LaBoy.

The inconsistency between the original transcript and the revised transcript is no different that the inconsistency between the license

revocation hearing transcript and the revised transcript. The point of contention being whether King responded to the officer's statement that the merchandise was "hot." Defense counsel extensively cross-examined the officers regarding the inconsistency between the original an revised transcripts, thereby calling attention to the discrepancies. So, in reaching the verdict of guilty the jury necessarily found the officer's explanation for the inconsistency credible and ultimately found that King did knowingly purchase goods represented as stolen. To the extent the audio recording agrees with the license revocation transcript and thus is inconsistent with the revised transcript, the jury heard the audio recording and resolved any inconsistency against King. Perhaps more significant, is the fact that the license revocation

hearing testimony was itself considered by the post-conviction court in light of all other evidence offered at trial and in finding the evidence sufficient to convict, that court also concluded that the jury had necessarily resolved the inconsistencies presented in favor of the police officers. The jury's finding was upheld by the state appellate court and this ruling was held to be res judicata on the issue of whether the inconsistent testimony provided at the license revocation hearing entitled King to a new trial. Because there was no inconsistency provided by the transcript of the license revocation hearing that the jury was not already aware of, there is no basis to conclude that evidence was altered. At most, the evidence presented inconsistencies which were resolved at trial and their resolution upheld on appeal. Because the decision

of the post-conviction court, in essence, does resolve the question of whether the defendants fabricated evidence at trial, it should be given preclusive effect.

C. Committing and Suborning Perjury

King also claims that prior testimony of the officers given under oath at the licensing hearing proves that the defendants perjured themselves at trial and conspired with Officer Jarman to present false testimony. This knowing and intentional subornation of perjury, he alleges, denied him a fair trial. In addressing King's claim of perjured testimony, we need not consider whether collateral estoppel precludes litigation but rather can resolve this issue on grounds of immunity.[8] With respect to the police officers who King alleges perjured themselves at trial, they are entitled to absolute immunity

from civil liability. Briscoe v. LaHue, 460 U.S. 325, 332 (1983)(a police officer who gave perjured testimony at plaintiff's criminal trial was absolutely immune from subsequent damages liability under Sec. 1983 "even if the witness knew the statements were false and made them with malice"); Stokes, 744 F.Supp. at 186.

Even if the defendants are immune from liability for their own testimony, King urges that absolute witness immunity should not shield those officers for suborning perjury from Officer Jarman. This argument, however, is precluded by this court's recent decision in House v. Belford, 956 F.2d 711, 720 (7th Cir. 1992), in which the court extended Briscoe immunity to alleged conspiracies to commit perjury, reasoning that "[a] person may not be prosecuted for conspiring to commit an

act that he may perform with impunity."See also Wilkins, 872 F.2d at 192; accord Miller v. Glanz, 948 F.2d 1562, 1571 (10th Cir. 1991)(joining this circuit and the Sixth Circuit in holding that absolute witness immunity extends to conspiracies to present false testimony). On the basis, King's claim that his conviction was wrongfully procured through a conspiracy to present false testimony must fail.

## III. CONCLUSION

In sum, we conclude that with respect King's claim that Officer Patterson omitted material information when seeking a warrant for King's arrest, King has failed to present evidence sufficient to challenge the existence of probable cause and therefore, summary judgment was proper. Relitigation of the issue of whether the defendants fabricated and withheld

evidence was properly collaterally estopped because it was necessarily determined at trial, affirmed on appeal and held to be res judicata by the post-conviction court. Finally, the defendants are entitled to absolute immunity from liability under Sec. 1983 based on their testimony at trial and for allegedly conspiring to present false testimony. For these reasons, the judgment of the district court is AFFIRMED.

FOOTNOTES

[1]. In his pro se brief filed on appeal, King attempted to revive the issue of immunity which was granted to the prosecutor and affirmed by this court. However, amicus counsel acknowledges that dismissal on the ground of absolute immunity has been affirmed. King v. Goldsmith, 897 F.2d 885, 886 (7th Cir. 1990). The previous decision is now the law of the case and, presented with no argument of plain error, there is no reason to reexamine it. See Evans v. City of Chicago, 1013-14 (7th Cir. 1989), cert. denied, 495 U.S. 956 (1990).

[2]. Appellees urge the court not to consider the arguments presented by amicus counsel, to the extent they differ from those presented by King. They argue that King has waived these issues by not presenting them as such in

his pro se brief. A liberal reading of King's pleadings, as is required, Estelle v. Gamble, 429 U.S. 97, 97 S.Ct. 285 (1976); Haines v. Kerner, 40 U.S. 519, 92 S.Ct. 594 (1972), indicates that issues presented by amicus were in fact raised by King. The fact that amicus may have furthered developed arguments on behalf of King does not detract from the fact that the issues were squarely presented in King's pro se brief.

[3]. Although raised in King's pro se brief, amicus curiae counsel does not pursue the false arrest claim.

[4]. Defendants also argue that they are entitled to summary judgment on the grounds of qualified immunity. However, the district court correctly concluded that Patterson would not be entitled to qualified immunity because under Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982), "lying to a magistrate to obtain an

arrest warrant would violate a clearly established constitutional right of which a reasonable person would have known."

In the alternative, defendants argue that a Sec. 1983 action is not the correct forum for plaintiff to air his grievances about the alleged unlawful arrest. Resort to a pre-deprivation hearing (*i.e.*, probable cause hearing) or to adequate post deprivation remedies via a petition for post conviction relief, defendants contend, provide adequate relief for the alleged Fourth Amendment violation. This doctrine first established Parratt v. Taylor, 451 U.S. 527, 101S.Ct. 1908 (1981), is inapplicable where the plaintiff asserts a violation of substantive constitutional guarantees as distinguished from a violation of procedural due process. Guenther v.

Holmgreen, 738 F.2d 879, 882 (7th Cir. 1984). As such it has no bearing on whether the defendants are liable under Sec. 1983 for violating the plaintiff's Fourth Amendment right to be free from unlawful arrest. Stokes v. City of Chicago, 744 F. Supp. 183, 188 n.5 (N.D. Ill. 1990); see also Mahoney v. Kesery, 976 F.2d 1054, 1061 (7th Cir. 1992) (Parratt, does not bar a suit for violation of the right to be compelled to incriminate oneself); Wilkins v. May, 872 F.2d 190, 194-95 (7th Cir. 1989)("substantive due process" encompasses the right to be free from police interrogation so coercive that it infringes traditional liberties), cert. denied, 493 U.S. 1026 (1990).

[5]. Applying "long-established common-law principles," the Cameron court concluded that if plaintiff has been convicted of the crime for which he

was arrested, that conviction is conclusive evidence of lawful arrest; and so serves as a complete defense to a Sec. 1983 action asserting that the arrest was made without probable cause. 806 F.2d at 387-89.

[6]. In *King I*, Judge Posner concluded that because King challenged his conviction on grounds of fraud, the rationale underlying the common law bar as discussed in Cameron was not squarely applicable to this case.

"Nothing in the formulation or rationale of the common law rule bars relitigation of the issue of the plaintiff's criminal guilt if the prosecution in the criminal proceeding had procured the plaintiff's conviction by fraud, as the plaintiff in this case charges. Otherwise police officers could procure a conviction by fraud and then--irrespective of whatever

exceptions a state's law of res judicata and collateral estoppel had created for just such cases--use that conviction to bar their victim's effort to redress the fraud by means of a tort action, whether for false imprisonment, or for malicious prosecution, or for violation of civil rights. Cameron does not read on that case." King, 897 F.2d at 887.

7. The government's brief focused on the establishment of probable cause through conviction and does not rely on prior resolution of the issue through a hearing on a motion to suppress evidence.

8. The appellate court may affirm a grant of summary judgment on any ground supported by the recorded. Box v. A & P Tea Co., 772 F.2d 1372, 1376 (7th Cir. 1985), cert. denied, 478 U.S. 1010 (1986).

(Unpublished order)

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

July 6, 1994

No. 92-1040

Before

Hon. WILLIAM J. BAUER, Cicuit Judge

Hon. JOEL M. FLAUM, Circuit Judge

Hon. FRANK H EASTERBROOK, Circuit Judge

(Wrong District Court Listed, petitioner has inserted proper heading)

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division

No. 86-C-1471

Sarah Evans Barker, Judge.

FREDERICK J. KING, Plaintiff-Appellant

GERALD YOUNG and JOHN PATTERSON,

Defendants-Appellees

ORDER

On consideration of the petition for rehearing filed by plaintiff-appellant and the petition for rehearing with suggestion for rehearing en banc filed by amicus curiea, all of the judges on the original panel have voted to deny and no judge in active service requested a vote thereon.

Therefore, the petition for rehearing and the petition for rehearing with suggestion for rehearing en banc are DENIED.

## CONSTITUTIONAL AMENDMENTS AND STATUTES INVOLVED

Petitioner brought federal suit pursuant to 42 U.S.C. Sec. 1983 and 1985.

Section 1983. Civil Actions for deprivation of rights.

Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District

of Columbia shall be considered to be a statute of the District of Columbia.

Section 1985. Conspiracy to interfere with civil rights.

(2)(b) [or] if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws.

FIRST AMENDMENT.

Congress shall make no law respecting an establishment of religion, or prohibiting the free excercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceablyy to assemble and to petition

the Government for redress of grievances.

FOURTH AMENDMENT

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

FIFTH AMENDMENT

No person...shall be compelled in any criminal case to be witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

SIXTH AMENDMENT

In all prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which districts shall have been previosly ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

EIGHT AMENDMENT

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

FOURTEENTH AMENDMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are

citizens of the United States and of the State wherein they rreside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

ARTICLE IV OF THE CONSTITUTION

Section 2. The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

INDIANA STATE STATUTES INVOLVED

35-41-5-1 Attempt

Sec. 1. (a) A person attempts to commit a crime when, acting with culpability required for commission of the crime, he engages in conduct that constitutes a substantial step toward commission of

the crime. An attempt to commit a crime is a felony or misdemeanor of the same class as the crime attempted. However, an attempt to commit murder is a Class A felony.

(b) It is no defense that, because of a misapprehension of the circumstances, it would have been impossible for the accused person to commit the crime attempted.

35-43-4-2 Theft; receiving stolen property

Sec.2. (a) A person who knowingly or intentionally exerts unauthorized control over the property of another person, with intent to deprive the other person of any part of its value or use, commits theft, a Class D felony.

(b) A person who knowingly or intentionally receives, retains, or disposes of the property of another person that has been the subject of

theft commits receiving stolen property, a Class D felony.

tion or secret formula that guarantees the Court will hear your case. An unparalleled team of Supreme Court practitioners and legal scholars could prepare your petition for certiorari, yet the Court may enter a simple "Certiorari Denied" on its order list. It is trite, but true, that you cannot make a silk purse of a sow's ear.

On the other hand, many cases for which counsel seek Supreme Court review contain the seed of an important, far-ranging issue that deserves the Court's attention. It is up to counsel for petitioners to uncover that seed of constitutional dimension, analyze its significance and package it so that its importance will be at once apparent to the Supreme Court.

Although there is no simple formula for success in the certiorari process, there are a few fundamental rules that, if followed, should greatly increase the odds of getting your case before the Supreme Court.

### Commandment No. 1

**Make an honest assessment of your case.** Better cases have a better chance of being reviewed. The first rule of any certiorari primer, therefore, is to take a good, hard look at your case. If you do not have a colorably cert-worthy issue, you should petition for certiorari.

Supreme Court Rule 17 sets forth the considerations governing review on certiorari. Certiorari review is discretionary and granted only for "special and important reasons," such as (1) the existence of a true and significant conflict, or (2) when the lower court has decided an important question of federal law that should be settled by the Supreme Court, or (3) the federal court of appeals "has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision."

When you have a genuine circuit conflict or a "hot" issue, your chances of success increase significantly. Most attorneys who petition for certiorari, however, reassess the advisability of seeking review.

There is one additional point to keep in mind. Rule 49.2 provides that the Court may award "appropriate damages" for frivolous petitions and appeals. This provision has been largely ignored until the current term, when some justices have indicated in off-the-bench comments that the Court should invoke this power.

### Commandment No. 2

**Determine whether you really want a dispositive, national policy on your issue.** Institutional litigants and public policy organizations often have a luxury not available to most individuals. They can look at the big picture and consider not only the immediate best interests of their client in a particular case but also can consider how their individual case affects the development of the law. You may have lost below, but your client or similarly situated litigants may be better off ultimately with one adverse court of appeals decision than a possible adverse Supreme Court (and national) decision. Many institutional defendants deliberately elect not to petition for Supreme Court review, although their case contains a cert-worthy issue. If you have this luxury, consider carefully what is the best case and the best court to push the law in the direction you wish it to go.

### Commandment No. 3

**Read the Supreme Court Rules.** Court rules are a starting point for attorneys in all forums, and the Supreme Court is no exception. The rules provide a wealth of essential information, including the mechanics and time requirements for filing petitions and the factors the Court considers in addressing its docket. The numerous additional procedural questions not covered by the rules usually can be answered by the Office of the Clerk of the Supreme Court at (202) 479-3011, or from *Supreme Court Practice,* by Stern and Gressman, an excellent guidebook for Supreme Court practice.



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